IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 23.11.2006

CORAM:

THE HONOURABLE MR.JUSTICE A.KULASEKARAN

SA.No.581/1996

1.Ramakrishnan (deceased)
2.Mallika
3.Jayanthi
4.Thulasi
5.Ganga
(Appellants 2 to 5 are brought on record as LRs of the sole appellant as per order dt. 23.11.2006 and made in CMP 10401/2006 .. Appellants (1st Defendant)

Vs.

1.Susilammal
2.Rukmaniamal Respondents/ 2nd Plaintiff and 2nd Defendant

Prayer:- This Second Appeal is filed against the judgement and decree dated, 14.9.1995, made in AS.No.40/1994, on the file of the Subordinate Judge, Arni, confirming the judgement and decree made in OS.No.90/1985, dated 29.9.1993, on the file of the Addl.District Munsif Court, Arni.

For Appellants : Mr.A.Jinasenan

For Respondent : Mr.K.A.Ravindran

JUDGEMENT

1.The 1st Defendant died during the pendency of this Second Appeal and his legal heirs are the Appellants herein in this second appeal.

2.The 2nd Plaintiff, who is the 1st Respondent herein and one Lakshmiammal/1st Plaintiff filed the suit in OS.No.90/1985, before the District Munsif Court, Arni for partition and the said suit was decreed as prayed for. As against the same, the appeal filed by the 1st Defendant in AS.No.40/1994 before the Subordinate Judge, Arni was dismissed, confirming the Judgement and Decree of the Trial Court. Aggrieved by the same, this second appeal has been filed by the 1st Defendant.

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3.The facts, which resulted in filing of this Second Appeal, are as follows:-

The suit property originally belonged to one Ramarishna Chettiar, who had two sons viz. Govindaraj and Perumal. The Wife of Govindaraj, Lakshmiammal executed a Will, dated 30.8.1988 in favour of the 2nd Plaintiff/1st Respondent herein, bequeathing 50% of the share in the suit property. Hence, the suit has been filed for partition.

4.The first defendant/first appellant herein contested the suit stating that the suit properties originally belonged to Krishna Reddiar, he had three sons Govindasamy, Ramasamy and Perumal and they have partitioned the properties about 44 years prior to suit, both Ramasamy and Govindasamy orally settled their shares orally to Perumal, thus Perumal became absolute owner, who died in the year 1965 and thereafter he is in possession and enjoyment.

5.The second defendant contended that Ramasamy died as bachelor, Perumal and Govindaraj lived together, second defendant married perumal, 1st defendant married Govindaraj. Govindaraj and Lakshmiammal had no issues. After the demise of Govindaraj, Lakshmi Ammal lived with her sisters second and first defendant. Lakshmiammal executed a Will dated 12.12.1988 in favour of the second defendant. The will dated 30.08.1988 said to have executed by Lakshmiammal in favour of second Plaintiff/1st respondent is false.

6.Before the Trial Court, the Plaintiffs marked Exs.A1 to A13 and examined the 2nd Plaintiff, Susilammal as PW.1, one Harikrishnan as PW.2, one Thulasingam as PW.3, one Govindan as PW.4 and one Selvaraj as PW.5 and the Defendants marked Ex.B1 to B35 and examined the 1st Defendant as DW.1, one Kannan as DW.2, the 2nd Defendant as DW.3 and one Murugesa Mudaliar as DW.4.

7.The learned counsel for the Appellants has submitted that the suit property originally belonged to one Ramarishna Chettiar, who had two sons viz. Govindaraj and Perumal; that the Wife of Govindaraj, Lakshmiammal allegedly executed a Will, Ex.A1 dated 30.8.1988 in favour of the 1st Respondent herein, bequeathing 50% of the share in the suit property, which she was entitled to after the demise of her husband Govindaraj in the property of the Ramakrishna Chettiar; that the said Will later was cancelled by the said Lakshmiammal by executing another Will dated 12.12.1988 under Ex.B34 in favour of the 2nd Defendant, who is the 2nd Respondent herein, bequeathing the very same property to her; that the said Lakshmiammal and Rukmaniammal were the blood sisters; that when Lakshmiammal filed the case for partition, it was resisted by the 1st Appellant/1st Defendant and Rukmaniammal, the 2nd Respondent herein/2nd Defendant

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on the ground that the Will under Ex.A1 was cancelled by Ex.B34; that the trial court without proper consideration of Ex.B34 as well as taking into consideration of non compliance of Section 68 of the Transfer of Property Act in respect of Ex.A1, decreed the suit, which was also erroneously confirmed by by the lower Appellate Court and hence, prayed for setting aside the Judgement and Decree of the courts below.

8. The learned counsel for the Respondents has submitted that the said Lakshmiammal executed the Will, Ex.A1 dated 30.8.1988 and that thereafter, she was living only with the 1st Respondent and never went out of the Village and later she died on 17.12.1988; that while so, another Will dated Ex.B34 dated 12.12.1988 said to have been executed by Lakshmiammal in favour of the Rukmaniammal is nothing but a concocted story; that the Respondents by examining the attesting witness of Ex.A1, Pw.1 as well as the scribe of Ex.A1, proved the Will, but the 1st Appellant failed to prove Ex.B34; that considering the said facts, both the courts below granted the relief sought for the Respondents and hence prayed for dismissal of this Second Appeal.

9. This court carefully considered the arguments of the learned counsel on either side and perused the material records placed.

10. This Second Appeal was admitted on the following substantial question of law:_

> "Whether the courts below have properly considered the proof with reference to Ex.A5 and Ex.B34 as required under Section 68 of the Indian Evidence Act?"

11. To resolve the issue involved in this Second Appeal, Exs.A1, A5 and B34 are sufficient.

12. Ex.A1 dated 30.8.1988, Will executed by Lakshmiammal in favour of the 1st Respondent herein is registered one. In Ex.A5, Lakshmiammal mentioned the reason as to why she was residing with 1st Respondent continuously. In Ex.A5, she categorically mentioned that the 1st Respondent alone took care of her and provided food and shelter to her. In Ex.A1, the said Lakshmiammal also mentioned that the 1st Respondent alone provided food and shelter and hence, out of love and affection, she executed the said Will in her favour, bequeathing the property, which she was entitled to. The two witnesses attested Ex.A1, viz. Sadayandi, who later died and Harikrishnan, PW.2. The scribe of the Will Ex.A1 Tulasingam was also examined as PW.3. PW2, one of the attesting witnesses deposed that Lakshmiammal affixed her thumb impression in each and every page. Pws 2 and 3 in their evidence stated that she was hale and healthy and in sound state of mind. The courts below, considering

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the evidence of PW.2 and PW.3, came to the conclusion that the 1st Respondent proved the will.

13.The averment that kist receipts in the name of Ramakrishnan is no significance since he was the eldest male member of the joint family. The oral partition between Govindasamy, Ramaswamy and Perumal took place and thereafter the settlement made by Ramasamy and Govindaraj in favour of Perumal not proved at all. It is an admitted fact that the plaintiff is wife of Govindaraj. After the death of Govindaraj, she is also in possession of the suit property along with others. It is further admitted by the appellant in his evidence that she share the produces of the suit property. Pursuant to her right to maintenance, her limited right or interest in the property thus far, by virtue of Section 14 (1) of Hindu Succession Act blossoms into full ownership. In this context, it would be useful to refer to the decision of the Honourable Supreme Court reported in (Smt.Naresh Kumari (dead) by Lrs and another v. Shakshi Lal (dead) by Lrs and another) AIR 1999 Supreme Court 928 wherein in Para No.5, it was held thus:-

> "5. Thus, Section 14 (1) enshrines long awaited, cherished and socially desirable protection right to a Hindu widow when her limited right in the estate of her husband, in lieu of her maintenance flowered into full right. She is conferred as full owner in such estate. The right to the maintenance of wife by a husband is recognised from the very inception, recognised even in the ancient vedic scriptures. This obligation was cast on the husband even where he had no property. However, when such benevolent principle was not followed,t he law created an equitable charge on the estate of the husband, whether self-acquired or a share in the ancestral property, for her limited right of maintenance. This charge was to place an obligation on the person inheriting such property of her husband to maintain the widow even where such property goes in their hands. Even before this 1956 Act, to secure justice to such widows, The Hindu Women's Rights to Property Act 1937 and the Hindu Married Women's Act to Separate Maintenance and Residence Act, 1946 were made. Each of these Acts did not give any new right to the widows, but gave recognition of their pre-existing rights..."

14.The substantial question of Law raised in this second appeal is

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whether the courts below considered properly the proof with reference to Ex.A5 and Ex.B34 as required under Section 68 of the Indian Evidence Act. Ex.B34 is a unregistered document which execution is specifically denied by the respondents. The attesting witnesses were not examined. The evidence of DW4, the scribe of Ex.B34 was rightly rejected as not worthy. When there is a specific denial of Ex.B34, it puts an obligation on the party tendering any document to examine at least one attesting witness. In the decision reported in (Rosammal Issetheenammal Fernandez (dead) by Lrs and others v. Joosa Mariyan Fernandez and others) AIR 2000 Supreme Court 2857 wherein in Para Nos. 7 and 9 it was held thus:-

> 7. ....In fact the very finding of the High Court: "it is difficult to infer a specific denial of the execution of the document" shows uncertainty and vagueness in drawing such inference. In considering applicability of proviso to Section 68 the finding should be clearly specific and not vaguely or negatively drawn. It must also take into consideration the pleadings of the parties which has not been done in this case. Pleading is the first stage where a party takes up its stand in respect of facts which they plead. In the present case, we find that the relevant part of the pleading is recorded in the judgment of the trial court dated 17th August 1977 which is the judgment prior to the remand.
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> 9. ....The pleading records that Defendants 1 and 2 forged the signature of their father after influencing the Sub-Registrar. The denial cannot be more strong than what is recorded here. Once when there is denial made by the plaintiff, it cannot be doubted that the proviso will not be attracted. The main part of Section 68 of the Indian Evidence Act puts an obligation on the party tendering any document that unless at least one attesting witness has been called for proving such execution the same shall not be used in evidence."

15.The first appeal as well as the second appeal were filed by the 1st appellant herein alone, but no appeal was filed by Rukmaniammal, who allegedly the beneficiary under the Will Ex.B34, which is not proved by the appellant. On the contrary, Ex.A4 was proved by the

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respondent. The courts below considering the evidence relating to Exs. A1, A5 and Ex.B34 and the fact that Ruckmaniammal did not file any appeal rightly negatived the claim of the appellant herein. In view of the same, the substantial question of Law is answered against the appellant.

16.Further, in exercise of power conferred under Section 100 CPC, this court also do not find any infirmity or illegality in the findings of the courts below, warranting interference by this court.

17.In the result, this second appeal fails and the same is dismissed. No costs.

Sd/
Asst.Registrar

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Sub Asst.Registrar

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To:

1.The Subordinate Judge, Arni (with records if any)
2.The Addl. District Munsif, Arni (with records if any)
3.The Record Keeper, VR Section, High Court, Madras

+1cc to Mr.A.Jenasenan, Advocate Sr 57364
+1cc to Mr.K.A.Ravindran, Advocate Sr 57158

MDR (CO)
km/21.12.

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